

# United States Court of Appeals

*for the Ninth Circuit*

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THEODORE B. RUSSELL,

*Appellant,*

*vs.*

THE TEXAS COMPANY, a corporation; FREDERICK T. MANNING DRILLING COMPANY, a corporation and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

*vs.*

THEODORE B. RUSSELL,

*Appellee.*

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## Petition for Rehearing

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FILED

DEC 21 1956

PAUL P. O'BRIEN, CLERK



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*To the United States Court of Appeals for the Ninth Circuit and the Judges thereof, to-wit: the Honorable Circuit Judge Stephens, the Honorable Circuit Judge Bone and the Honorable District Judge Halbert, the Judges constituting the said Court at the original hearing upon this appeal.*

Comes now Theodore B. Russell, the appellant in the above entitled cause, and presents this, his petition for a rehearing as to that portion of the above entitled appeal

relating to the appeal by petitioner from the judgment in favor of the appellee, the Northern Pacific Railway Company, a corporation, and in support thereof respectfully shows:

I.

The opinion and decision of this Honorable Court appears to be based principally upon the doctrines of estoppel. The judgment in favor of the appellee, Northern Pacific Railway Company, was a judgment rendered upon motion for partial summary judgment in the Court below. The law in such cases requires that before such a motion may properly be granted it must clearly appear that there is no issue of fact and the burden is upon the moving party to establish the absence of such an issue. Any reasonable doubt in that connection must be resolved in favor of the party resisting the motion. The point to be determined on motion for summary judgment is whether there is a real issue existing and in doing this all doubts are resolved against the movant.

Fairbanks Morse & Co. v. Consolidated Fisheries Co., 190 Fed. (2d) 817, 824;

Lande v. Silverman, 189 Fed. (2d) 80, 82;

Ford v. Luria Steel & Trading Corp., 192 Fed. (2d) 880, 882;

Snyder v. Dravo Corporation, 6 F.R.D. 546, 549;

Thomas v. Martin, 8 F.R.D. 638;

St. Louis Fire & Marine Ins. Co. v. Witney, 96 Fed. Supp. 555;

U. S. v. Haynes School District No. 8, 102 Fed. Supp. 843, 848.

The general rule is that estoppel is a question of fact requiring a showing by the party asserting the estoppel of the facts to establish the defense and the burden of proof rests upon the party asserting the estoppel.

19 Am. Jur., Estoppel, Sec. 200, p. 856, and cases there cited including Dowling v. National Exchange Bank, 145 U. S. 512, 36 L. Ed. 795, 12 Sup. Ct. 1298;

19 Am. Jur., Estoppel, Sections 198 and 199, pp. 852, 853, 854, and cases there cited.

It necessarily follows that the party against whom the estoppel is asserted is entitled to meet the evidence relied upon as establishing estoppel by proper rebuttal evidence on the trial of the issue. In other words, where the estoppel is asserted it would seem that an issue exists as to which the party resisting the asserted estoppel is entitled to his day in court. In this connection, it makes no difference that it might appear that such party is unlikely to prevail upon the trial.

Sprague v. Vought, 150 Fed. (2d) 795, 801.

With further reference to the question of estoppel, it is also elementary that a void instrument, or provision therein, cannot operate as an estoppel.

19 Am. Jur., Estoppel, Sec. 8, p. 605.

It has, of course, been and now is our contention that the purported reservation upon which the Railway Company founds its claim and upon which this Court apparently bases its conclusions upon the doctrine of estoppel is void as contrary to the law. We cited to the Court the case of

Oregon & C. R. Co. v. U. S., 238, U. S. 393, 59 L. Ed. 136.

wherein the Supreme Court of the United States held that these granting acts are laws as well as contracts and have the force and effect of law. Such being the case, under the general rule that the law relative to a contract becomes a part of the contract.

12 Am. Jur., Contracts, Sec. 240, p. 769, and cases there cited;

Valier County v. State, 123 Mont. 329, 215 Pac. (2d) 966, Cer. Denied, 71 Sup. Ct. 63, 340 U. S. 827, 95 L. Ed. 607,

the proviso of the Joint Resolution of 1870 must be read into the deed to appellant's predecessor and the reservation being in conflict therewith must fail. This proposition also results in the destruction of arguments based upon the rule adverted to by the Court to the effect that in actions to quiet title or remove a cloud upon the title the plaintiff must succeed on the strength of his own title and not upon the weakness of the defendant's title.

With further reference to the matter of estoppel we take it as elementary that one who is asserting a legal position based upon estoppel must as a condition thereto show the equity of his position. The maxim being that he who seeks equity must do equity and that he who seeks equity must come with clean hands. This, we contend, the Railway Company is utterly incapable of doing, its sale to Mabelle Cobb and the form of its deed being directly in conflict with the legislative intent, which observation brings us to a consideration of the legislative history of the act referred to by this Court in foot note No. 4 of its Opinion.

## II.

It should be noted that the particular land here involved was not land which was earned or to which the grant had become fixed at the time of the Joint Resolution of 1870. See paragraph IV of the Separate Answer of the Northern Pacific Railway Co., R. 38-41.

The congressional history is understandable when considered in light of the fact that as to certain of the lands granted by the Act of 1864 the grant had become fixed at the time of the Joint Resolution. The Congress understandably took the position that to impose new conditions upon the railroad's title to such land would be unjust. Based upon this congressional history it has been contended that the words "hereby granted" used in the proviso of the Joint Resolution by the Congress could only be applied to the additional lands in Washington and Oregon granted

by the Joint Resolution and that the regrant theory advanced herein by the appellant is thereby destroyed. However, in the Joint Resolution we find further employment of the words "hereby granted" which destroys this position and reinforces the position of the appellant as to appellant's regrant theory.

The Congress, in the Joint Resolution, in providing for foreclosure of the mortgage permitted by the Joint Resolution, used the following language:

"\* \* \* and if the mortgage hereby authorized shall at any time be enforced by the foreclosure or other legal proceedings, or the mortgaged lands *hereby granted*, or any of them, be sold by the trustee to whom such mortgage may be executed, either at its maturity or for any failure or default of said company, under the terms hereof, *such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate*, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder." (Emphasis supplied).

The use of the plural reference to states and territories indicates clearly that the words "hereby granted" in the above quotation refers to all of the lands acquired by the railroad whether granted by the Act of 1864 or the Resolution of 1870. If we assume that the Congress by the use of the words "hereby granted" in the proviso meant to refer only to the new "place" lands then we must assume that the Congress considered the lands here involved to be

lands "hereby granted" for one purpose and not for another. The illogic of this position is readily apparent.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that in order that the congressional intention that the railroad grant land should be made available to the general public at a maximum consideration within a specified period of years may be accomplished, the Judgment of the District Court of the United States in and for the District of Montana be, upon further consideration, reversed.

Respectfully submitted,

RALPH J. ANDERSON,

STANLEY P. SORENSON,

*Attorneys for Appellant.*

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### CERTIFICATE

I, Ralph J. Anderson, do hereby certify that I am one of the counsel for Theodore B. Russell, the appellant in the above entitled action, and that the foregoing Petition for Rehearing is not interposed for purposes of delay but is presented in good faith and in my judgment is well founded and proper to be filed herein.

RALPH J. ANDERSON.

